



July 21, 1999

Ms. Dawna R. Carr
Escamilla & Poneck, Inc.
1200 South Texas Building
603 Navarro Street
San Antonio, Texas 75205-1826

OR99-2047

Dear Ms. Carr:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 125853.

The Greater Kelly Development Corporation ("GKDC") received a request for information concerning services provided to GKDC by EG&G Management Services of San Antonio ("EG&G"). You state that GKDC will make some of the requested information available. On behalf of EG&G, you contend that the remaining information at issue is excepted from disclosure under sections 552.104 and 552.110 of the Government Code.¹ We have considered the exceptions you claim and have reviewed the information at issue.

Initially, we note that a governmental body's violation of the Act's time deadlines results in the presumption that the requested information is public. *See* Gov't Code §§ 552.302, .303(e). Where information is made confidential by other law or where third party interests are at issue, a compelling reason exists to overcome the presumption that information is public. *See* Open Records Decision No. 150 (1977). You have informed this office that GKDC's time deadline for submitting information to this office was tolled while GKDC and the requestor were "clarifying" the request for information. Because the only interests at stake here are those of a third party, we need not consider whether GKDC's time deadline was tolled. We note, however, that this office makes such determinations on a case-by-case basis. Finally, please note that the deadline that was tolled in Open Records Decision No. 333 (1982) was the ten day deadline for requesting a decision from this office, not the seven day deadline under section 552.303 for responding to a written notice from this office.

Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental

¹You also claimed that the information at issue was excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. However, you subsequently withdrew those claims.

body's interests in competitive bidding situations. See Open Records Decision No. 592 (1991). You have not established that GKDC is currently involved in a competitive bidding situation. Both you and EG&G contend that section 552.104 should protect EG&G's competitive interests by shielding the information at issue from disclosure. Section 552.104 does not, however, protect the interests of private parties that submit information to a governmental body. ORD 592 at 8-9. For these reasons, section 552.104 does not except the information from disclosure.

On behalf of EG&G, you also contend that the information at issue is excepted from disclosure under section 552.110. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), cert. denied, 358 U.S. 898 (1958); see also Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).² This office has held that if a governmental

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:


- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information

body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). Having carefully considered GKDC's arguments on behalf of EG&G, we find that GKDC has not established, by a *prima facie* case, that the information at issue should be excepted from disclosure as a trade secret.

Finally, you contend that the information should be excepted from disclosure under the commercial or financial information prong of section 552.110. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110 for commercial and financial information. Thus, this office relied on *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), as a judicial decision and applied the standard set out in *National Parks* to determine whether information is excepted from public disclosure under the commercial and financial prong of section 552.110. However, the Third Court of Appeals recently held that *National Parks* is not a judicial decision within the meaning of section 552.110. *Birnbaum v. Alliance of Am. Insurers*, 1999 WL 314976 (Tex. App.—Austin May 20, 1999, no pet. h.). Because neither you nor GKDC has cited to a statute or judicial decision that makes commercial or financial information privileged or confidential, you may not withhold the information at issue from disclosure under the commercial or financial information prong of section 552.110. Accordingly, GKDC must release the information to the requestor.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,


Karen E. Hattaway
Assistant Attorney General
Open Records Division

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could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Ref: ID# 125853

Encl. Submitted documents

cc: Mr. Mario Salas
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966
(w/o enclosures)